

Original

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

FILED

JUN 27 2003

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

BLAKE HANKINS STOVER
Federal Registration No. 14586-064
Unit C-3
United States Penitentiary-Pollock
P. O. Box 2099
Pollock, Louisiana 71467,
Complainant

-vs-

UNITED STATES DEPARTMENT OF JUSTICE
Serve: Mr. John Ashcroft
Attorney General
United States of America
Suite 570, Flag Building
Washington, D.C. 20530-0001

CASE NUMBER 1:03CV01410

JUDGE: Royce C. Lamberth

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 06/27/2003

and

FEDERAL BUREAU OF PRISONS
Serve: Mr. Harley G. Lappin
Director
Federal Bureau of Prisons
Central Office
320 First Street
Washington, D.C. 20534,
Respondents

COMPLAINT

The complainant, BLAKE HANKINS STOVER, pro se, hereinafter referred to as "Stover," respectfully represents unto this Honorable Court as follows in support of his COMPLAINT herein seeking an injunction against the respondents, UNITED STATES DEPARTMENT OF JUSTICE, hereinafter referred to as "the DOJ," and the FEDERAL BUREAU OF PRISONS, hereinafter referred to as "the BOP," jointly and severally, enjoining the respondents from withholding certain records improperly withheld from the complainant and ordering the production of such records:

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JURISDICTIONAL BASIS

The U. S. District Court, District of the District of Columbia, Washington, D. C., has subject matter jurisdiction over the case or controversy set forth herein by virtue of the Due Process Clause of the Fifth Amendment to the United States Constitution and 5 USC §552(a)(4)(B). Title 5 USC §552(a)(4)(B) confers jurisdiction upon this Honorable Court to enjoin the respondents, executive agencies of the United States Government, from withholding the agency records described herein and order the production of said records which are lawfully withheld from Stover.

The U. S. District Court, District of the District of Columbia, is vested with territorial jurisdiction over the instant litigation by virtue of 5 USC §552(a)(4)(B), which imparts jurisdiction based upon the situs of the agency records sought. The records sought herein are maintained and stored in the BOP's Central Office in Washington, D.C., and are easily accessible to the agency.

STATEMENT OF PURPOSE

The current complaint seeks to enjoin the respondents, jointly and severally, from withholding recordings and/or transcripts thereof of specific telephone conversations between Stover and his appellate counsel during the direct appeal of convictions and sentences imposed by the U. S. District Court, Western District of Oklahoma, during which Stover was conferring with his counsel via a BOP inmate telephone. The recordings were made, maintained, and stored by the BOP routinely, in the normal course of business, and do not fall within the ambit of the statutory exceptions under

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which the BOP and the DOJ are entitled to withhold records contained in The Freedom of Information Act, 5 USC §552(b).

Stover is investigating and preparing a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 USC §2255. The records sought herein constitute evidence that the complainant was deprived of his right to the effective assistance of appellate counsel guaranteed by the Sixth Amendment to the United States Constitution during his direct appeal. Stover has no adequate remedy at law and an award of money damages will not make him whole. He will be irreparably damaged in his pursuit of post-conviction relief under 28 USC §2255 in the absence of the records sought herein. Thus, the remedy of injunctive relief is fully warranted under 5 USC §552 and other applicable constitutional and statutory principles.

COUNT ONE

Stover respectfully alleges unto this Honorable Court as follows in support of his claim under Count One:

1. Stover is a federal prisoner housed at the United States Penitentiary-Pollock, Unit C-3, P. O. Box 2099, Pollock, Louisiana in the custody of the BOP.

2. Stover is serving a federal term of imprisonment of life plus 30 years in the BOP as punishment for one count of conspiracy to manufacture, possess with intent to distribute controlled substances in violation of 21 USC §§841 and 846, and eight substantive convictions in violation of Title 21, U. S. Code, and Title 18, U. S. Code.

3. The DOJ is an executive agency of the United States of America charged with the responsibility of implementing and executing

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the sentences of federal prisoners incarcerated in federal prisons within the United States of America for violation of federal criminal statutes legislated by the United States Congress. The DOJ fulfills the definition of an "agency" under the terms of 5 USC §§551(1) and 552(f), and exercises supervisory powers over the BOP with respect to the BOP's duty to provide records to federal prisoners duly requested pursuant to The Freedom Of Information Act, 5 USC §552.

4. The BOP is an executive agency of the United States of America under the definition of "agency" set forth in 5 USC §§551(1) and 552(f). The BOP operates under the supervision and control of the DOJ and the Attorney General of the United States, and is vested with the care, supervision, custody and control of federal prisoners convicted of violations of federal criminal statutes, including the violations of federal criminal statutes for which Stover is imprisoned, and the provision of records to prisoners entitled thereto under The Freedom Of Information Act, 5 USC §552, made, maintained, and stored by the BOP.

5. Mr. John Ashcroft is the chief legal officer of the United States Government and serves in the capacity of the Attorney General of the United States. Accordingly, Mr. Ashcroft is the legal representative of the DOJ upon whom service of process may be legally had for cases and controversies in which the DOJ is named as a party.

6. Mr. Harley G. Lappin is the Director of the BOP, and as such, is the legal agent and representative of the BOP upon whom service of process may be legally effectuated for cases or

controversies in which the agency's authority to withhold records from federal prisoners under the purview of The Freedom of Information Act, 5 USC §552 is at issue.

7. Mr. Stephen Cribari was appointed as appellate counsel to represent Stover during his direct appeal of his convictions and sentences to the United States Court of Appeals for the Tenth Circuit. During the pendency of the direct appeal, a controversy between Stover and his appellate counsel developed in which Stover found it necessary to file pro se pleadings asserting the existence of an irreconcilable breakdown in communication between Stover and his counsel and move for the substitution of alternate counsel and the withdrawal of an appellant's brief filed by appellate counsel.

8. Stover's pro se pleadings in the court of appeals prompted appellate counsel to file a responsive pleading which was replete with misrepresentations denying Stover's allegations, alleging, inter alia, as follows:

a. Stover left "innumerable phone messages, often left multiple times on a daily basis" when counsel was not in his office;

b. Stover had attempted to contact appellate counsel more than any client ever represented by counsel on a telephone line that was monitored by an automatic answering machine that was not filtered by a secretary; and

c. Counsel did, in fact, familiarize himself by the trial record and raised all nonfrivolous issues in the brief on behalf of Stover eventually filed by appellate counsel.

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9. The only direct contact which Stover had with appellate counsel during the pendency of his direct appeal consisted of telephone calls initiated by Stover through the BOP's Inmate Telephone System at the U. S. Penitentiary-Pollock, Pollock, Louisiana.

10. All telephone calls initiated by inmates housed at the U. S. Penitentiary-Pollock are recorded and monitored by the BOP.

11. During the pendency of his direct appeal, Stover attempted to telephone his appellate counsel on 134 occasions. He was able to confer telephonically with appellate counsel on six occasions for a total of 66 minutes. On another occasion, Stover talked with a secretary for two minutes (please refer to Exhibit A, BOP Telephone Account Statement).

12. The BOP Telephone Account Statement attached hereto as Exhibit A conclusively proves that counsel grossly misrepresented the facts when he stated to the appellate court that innumerable phone messages had been left multiple times on a daily basis on counsel's telephone answering machine. An inmate telephoning a number from the U. S. Penitentiary-Pollock cannot leave messages on automatic answering machines unless a party on the telephone called physically presses the digit "5" to complete the circuit.

13. The contents of the telephone conversations at issue between Stover and appellate counsel will conclusively prove that appellate counsel did not, in fact, familiarize himself with the trial record and raise all nonfrivolous issues in the brief which counsel filed with the appellate court on behalf of Stover.

14. On July 3, 2002, Stover completed an Inmate Request to Staff Member (cop-out) addressed to his institution, requesting

copies of recordings or transcripts thereof of telephone conversations made to appellate counsel. Stover emphatically expressed to the BOP in his cop-out that records relating to such conversations must be preserved for use in his direct appeal.

15. On July 8, 2002, Executive Assistant Jane Haschemeyer, an officer, agent, and employee of the BOP, replied to Stover's cop-out and abdicated responsibility for providing the records requested therein to the BOP's Freedom Of Information Act Office in Washington, D.C. The response further represented to Stover that the institution is not able to "freeze," or preserve, calls until directed to do so by the BOP's Central Office in Washington, D. C. (please refer to Exhibit B, Inmate Request To Staff Member and Disposition thereof).

16. On July 5, 2002, Stover notified the BOP and the DOJ of the necessity of preserving records of all telephone calls made by Stover to telephone number (303) 871-6257 (please refer to Exhibit C, letter dated July 5, 2002).

17. On August 5, 2002, Stover filed a Freedom Of Information Act Request with both the BOP Central Office and the BOP's Regional Office in Dallas, Texas, requesting the telephone records at issue. (please refer to Exhibit D, Freedom Of Information Act Request).

18. In a decision dated August 27, 2002, the Regional Office responded to the aforesaid request, denying the request on the following basis:

Because we do not have consent from the party you telephoned, release of their portion of the conversation would constitute an unwarranted invasion of their personal privacy. Therefore, pursuant to Title 5, United States Code, Section 552(b)(7)(C), the conversations are not releasable...

(please refer to Exhibit E, Regional Office's letter response).

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19. Title 5 USC §552(b)(7) states as follows:

This section does not apply to matters that are:

...

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information... (C) could be reasonably expected to constitute an unwarranted invasion of personal privacy...

20. The records sought by Stover are clearly not exempt under the provisions of 5 USC §552(b)(7) because the records were not compiled for law enforcement purposes. Even assuming that the records were compiled for such purpose, under binding case law emanating from the United States Court of Appeals for the District of Columbia Circuit the records do not constitute an unwarranted invasion of personal privacy.

21. The facts bearing upon the current complaint are very analogous to the facts in Smith v. U. S. Department of Justice, 251 F.3d 1047 (D.C. Cir. 2001). In Smith, a federal prisoner placed several calls to his attorney, utilizing a telephone line on which all calls were monitored and recorded pursuant to a policy of the BOP. The court of appeals ruled that the recordings were not exempt from disclosure under The Freedom Of Information Act, 5 USC §552, and that the complainant was entitled to the recordings which he had requested.

22. On August 31, 2002, Stover duly appealed the Regional Office's denial of his request for records.

23. In a letter dated September 13, 2002, Stover forwarded letters to the BOP's Regional Office and the DOJ's Office of Information and Privacy, advising both agencies of the holding in Smith (please refer to Exhibits F & G).

24. Stover again submitted an Inmate Request To Staff Member on September 30, 2002, to his institution notifying the BOP of the necessity of preserving all calls made by Stover to telephone number (303) 871-6257. (please see Exhibit H, Inmate Request To Staff Member).

25. Stover submitted a letter to the DOJ dated October 30, 2002, inquiring into the status of his appeal of the denial of his request for records under The Freedom Of Information Act, 5 USC §552, and voicing Stover's concerns about the possibility of destruction of the records pending the outcome of his appeal. (please refer to Exhibit I, letter from Stover to the DOJ).

26. In a letter dated January 6, 2003, to Stover, the Regional Office of the BOP advised him that the records relating to only three of the recorded calls had been located. The letter further stated that records relating to calls placed by Stover on February 14, 2002, May 21, 2002, and May 24, 2002, had been duplicated and copied to insure preservation of the records (please refer to Exhibit J, copy of letter from BOP to Stover).

27. The letter from the BOP dated January 6, 2003, to Stover also ruled, contrary to the explicit ruling in Smith about which the agency had been duly advised by Stover, as follows:

Pursuant to Title 5, U.S.C. §552(b)(7)(C), because we do not have consent from the party you telephoned and release of their portion of the conversation would constitute an unwarranted invasion of their personal privacy, [you will not be given copies of these recordings].

28. The DOJ, Office of Information and Privacy, denied Stover's appeal of the BOP's adverse decision in a letter dated April 7, 2003. (please refer to Exhibit K, copy of letter from the DOJ). In addition to reiterating the purported rationale for withholding the records sought provided by the BOP, the DOJ

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hinged its denial upon the Privacy Act of 1974, 5 USC §552a(j)(2):

These records are exempt from the access provision of the Privacy Act of 1974 pursuant to 5 USC §552a(j)(2). See 28 C.F.R. §16.97 (2002). Because these records are not available to you under the Privacy Act, your request has been reviewed under the Freedom of Information Act...

29. Title 5 USC §552a(j)(2) states, in relevant part, as follows:

The head of any agency may promulgate rules... to exempt any system of records within the agency from any part of this section...if the system of records is--

...

(2) maintained by an agency...which performs as its principal function any activity pertaining to the enforcement of criminal laws,...including... the activities of prosecutors, courts, [or]... correctional authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation...; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

30. A neutral application of the facts herein to 5 USC a(j)(2) and Smith obviates the necessity of delving into agency rules and regulations. On its face, Stover's request for records does not seek information compiled for the purpose of identifying individual criminal offenders and alleged offenders consisting only of identifying data and notations of arrests. The information sought consists of recorded telephone conversations with appellate counsel, who is purportedly a third party whose privacy rights are threatened. Thus, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status is not at issue.

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31. The records sought herein do not consist in any way of information compiled for the purpose of a criminal investigation or reports identifiable to an individual or information compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

32. Throughout the course of the administrative process within the BOP and the DOJ, the agencies have alluded to the necessity of having the consent of appellate counsel to the recordation of the conversations at issue as a prerequisite to production of the recordings. Smith unequivocally precludes this conclusion by specifically holding that a routinely recorded conversation between a federal prisoner and his counsel is not an intercepted conversation giving rise to a requirement of consent of counsel.

33. Stover has exhausted all available administrative remedies within the BOP and the DOJ. The aforesaid letter from the DOJ to Stover dated April 7, 2003, expressly states, "If you are dissatisfied with my action on your appeal, you may seek judicial review in accordance with 5 USC §552(a)(4)(B)."

34. Stover has heretofore been irreparably harmed by the refusals of the BOP and the DOJ to provide the records sought. The United States Court of Appeals for the Tenth Circuit denied Stover's request to withdraw appellate counsel's faulty brief and subsequently affirmed his convictions and sentences based upon such brief. If Stover had been provided with the records at issue, the disposition of the court of appeals would have been different.


35. The probability is great that in the absence of the records sought herein, Stover will be irreparably harmed in the litigation of his Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. §2255.

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36. Stover has no adequate remedy at law and an award of damages will not make him whole, resulting in a justification of extraordinary relief in the form of an injunction.

37. Stover is indigent and cannot afford to bear the costs attendant to the instant litigation. Thus, Stover respectfully submits that the Application for Leave to Proceed In Forma Pauperis attached hereto and filed herewith be approved by this Honorable Court.

WHEREFORE, the complainant, **BLAKE HANKINS STOVER**, pro se, respectfully requests that this court, pursuant to 5 USC §552(a)(4)(B) and the Due Process Clause of the Fifth Amendment to the United States Constitution, enter an order enjoining the BOP and the DOJ, jointly and severally, from withholding the agency recordings and/or transcripts thereof described hereinabove and compelling the agencies to produce said recordings and/or transcripts thereof to the complainant within a reasonable period of time defined by the court; that this court approve the Application for Leave to Proceed In Forma Pauperis attached hereto and filed herewith; that the BOP and the DOJ be ordered to pay the costs attendant to the litigation of the complaint herein; and that the court grant such other and further general relief that the court may deem just, fair, and appropriate under the circumstances herein.


BLAKE HANKINS STOVER
Pro Se